THE HON'BLE SRI JUSTIE B. PRAKASH RAO
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.No.21885 OF 2004

Date: 09.08.2006

Between:

The Govt. of A.P. rep., by its Principal Secretary , Finance (Admn.I) Dept, Secretariat, Hyderabad and another.

... Petitioners.

And

Sri K. Chenchu Subbaiah.

... Respondent.

THE HON'BLE SRI JUSTIE B. PRAKASH RAO
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.No.21885 OF 2004

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

Aggrieved by the order of the A.P. Administrative Tribunal in O.A. No. 10699 of 2002 dated 07.01.2004, the Government of Andhra Pradesh, represented by its Secretary (Finance & Planning) Department, is before this Court.

Facts, in brief, are that the respondent, (the applicant before the Tribunal), joined in service as a Junior Accountant on 23.06.1967. He was promoted as a Sub-Treasury Officer/Assistant Accounts Officer, vide proceedings dated 08.02.2002, and was posted to the office of the Prohibition and Excise Superintendent, Chittoor. The order of promotion required the respondent to join in the promotion post at Chittoor within fifteen days from the date of receipt of the order, failing which he would forfeit all his rights both for the present and in the future for higher posts as per Rule 11(b) of the A.P. State and Subordinate Service Rules, as amended vide G.O.Ms. No. 123 dated 14.03.2001 with effect from 19.12.2000. While Rule 11(b) provides for the consequences of a promotee's failure to join the promotion post within the time stipulated, Rule 28 relates to relinquishment. The respondent submitted a representation on 12.02.2002 stating that, since his son was suffering from Epilepsy, he was suffering

from hypertension and was not in a position to walk freely and had been advised continuous treatment and not to shift his family from Nellore and as he was due for retirement on 31.01.2004, he wished to relinquish his promotion as an Assistant Treasury Officer and forego the benefits due to him on promotion. The respondent-applicant requested that he be continued in the Sub-Treasury Office, Nellore duly accepting his request for relinquishment of promotion as an Assistant Treasury Officer. The respondent-applicant submitted another representation on 18.02.2002 reiterating that his request for relinquishment be considered and justice be done to him on humanitarian grounds. A few days thereafter on 28.02.2002, the respondent-applicant submitted another representation informing that he had not received any orders regarding acceptance of his relinquishment and, if the relinquishment had not been accepted by the Director of Treasuries and Accounts (AP) Hyderabad within the stipulated time of fifteen days, his request as stated in the said letter dated 28.02.2004 be considered favourably. The respondent stated that a post of Assistant Accounts Officer was vacant in the office of the Excise Superintendent, Nellore wherein he could be posted as a special case. He further informed that there was a vacancy in the post of Assistant Treasury Officer in the Sub-Treasury Rajampet near Nellore and that one post of Assistant Accounts Officer DPEP, Ongole was also vacant for the last one year and that his request for being posted at the above places may be favourably considered duly modifying the orders issued previously so as to enable him to join in the new post without inconveniencing his son's ill health.

The 2nd petitioner herein, vide proceedings dated

18.04.2002, took note of the fact that the District Treasury Officer in his letter dated 20.03.2002, had informed that the earlier orders were served on the respondent on 19.02.2002 but the respondent could not be relieved from the post of Sub-Treasury Officer as he had represented for relinquishment of his promotion to the category of Assistant Treasury Officer/Assistant Accounts Officer and had requested for continuance in the present post i.e., at the Sub-Treasury office, Nellore. The 2nd petitioner, in the said proceedings dated 18.04.2002, held that the respondent-applicant, instead of reporting for duty in the promotion post of Assistant Accounts Officer in the office of Prohibition & Excise Superintendent, Chittoor within the stipulated time limit of fifteen days from the orders of promotion i.e., 05.03.2002, had made a request for relinquishment of promotion at the first instance and had later requested for change of posting duly rejecting his request for relinquishment of promotion and as such he had not obeyed the instructions issued in the promotion orders with regards the stipulated time limit prescribed to join duty in the promotion post and had thereby forfeited all his promotional rights to the category of Assistant Treasury Officer/Assistant Accounts Officer permanently for the present and future, and that he be continued in his present post at the Sub-Treasury office, Nellore.

Aggrieved by the said order, the respondent-applicant herein preferred an appeal on 17.05.2002, wherein he stated that without considering his request or without orders being passed relieving him from his post at the Sub-Treasury office, Nellore, he could not have joined duty as an AAO in the office of the Excise Superintendent, Chittoor on or before 05.03.2002 and it was

therefore not possible for him to comply with the orders. The respondent-applicant stated that he had received orders on 07.05.2002 forfeiting all his promotional rights to the category of Assistant Treasury Officer/Assistant Accounts Officer permanently. The respondent contended that he was holding a responsible post at the Sub-Treasury office, with double lock keys, which was also a Gazetted Post, that he could not get himself relieved from the post without suitable instructions from the District Treasury Officer, Nellore, and that he could not join duty in the promotion post of Assistant Treasury Officer at Chittoor within the stipulated time limit of fifteen days from the date of receipt of promotional orders. The respondent contended that, on mere receipt of orders of promotion, he could not be deemed to have been relieved from his post at the Sub-Treasury Office, Nellore and as such the question of his disobeying the instructions issued, in the orders of promotion, with regards the time limit to join duty in his promotional post did not arise and that the orders issued, forfeiting all his promotional rights permanently for the present and future, was unjust and had caused him heavy loss. The respondent requested that his case be considered sympathetically and that necessary orders be issued for promoting him as an A.T.O/A.A.O. posting him nearer to Nellore on humanitarian grounds. The said appeal was rejected, by the 1st petitioner herein, vide memo dated 29.10.2002.

Aggrieved thereby the respondent-applicant approached the Tribunal. The Tribunal disposed of O.A. No. 10699 of 2002, by order dated 07.01.2004, holding that the respondent-applicant was entitled to be promoted to the post of A.T.O./A.A.O. in future vacancies on the basis of his seniority and eligibility. The Tribunal

referred to its earlier orders in O.A. No. 2558 of 2002 dated 27.02.2002 and O.A. No. 4440/2001 dated 15.02.2002 and held that they were not applicable to the facts of the present case as the respondent-applicant had not been relieved from his present post to enable him to join at the promoted place and, as he had withdrawn his relinquishment letter and was willing to accept the promotion, his case ought to have been considered for promotion. The contention of the respondent-applicant, that, though he had initially requested for relinquishment he had withdrawn the same and since he was not relieved from the post in view of the pendency of his representation he could not join in the promotion post and he had therefore not violated Rule 11(b) of the A.P. State and Subordinate Rules, was accepted by the Tribunal. The O.A. was disposed of holding that, under the peculiar circumstances of this case, the case of the respondent-applicant was entitled to be considered for promotion to the post of A.T.O/A.A.O for future vacancies on the basis of his seniority and eligibility.

Before us, the Learned Government Pleader for Services-I would submit that the findings of the Tribunal are perverse and contrary to the evidence on record. Learned Government Pleader would submit that, consequent upon the proceedings dated 08.02.2002 the respondent-applicant, in his representation dated 12.02.2002, had expressed his desire to stay at Nellore itself and had categorically stated that he wished to relinquish his promotion as an Assistant Treasury Officer since it would necessitate his leaving Nellore to go and join duty at Chittoor. Even in his representation dated 18.02.2002 this request for relinquishment was reiterated on the ground that he had to stay at Nellore on account of the illness of his son and as the doctors had advised

him to take continuous treatment and not to shift his family from Nellore. Even in his representation dated 28.02.2002 the resondent-applicant did not express his readiness to go and join his promotion post at Chittoor and instead sought for posting in the vacancies available, in the post of Assistant Accounts Officer/Assistant Treasury Officer, in or nearby Nellore itself. Since the respondent-applicant did not express his readiness to join his promoted post at Chittoor, the District Treasury Officer in his letter dated 20.03.2002 informed that the respondent could not be relieved from his post at Nellore, since he had represented for relinquishment of his promotion and had requested for being continued in service in the present post at Nellore itself. We find considerable force in the submission, of the Learned Government Pleader for Services-I, that the Tribunal had erred in holding that the petitioner could not join his promotion post at Chittoor since he was not relieved from duty at Nellore. His not being relieved from Nellore was at his behest since he had sought for retention at Nellore itself or to be posted in the promotion post at places in and around Nellore. At no point of time did the respondent-applicant ever inform, the petitioners herein, that he was ready and willing to join in the promotion post at Chittoor only upon which would the question of his being relieved from his post at Nellore arise. Learned Government Pleader would submit that, while Rule 11(b) was subsequently amended vide G.O.Ms. No. 145 dated 15.06.2004, the Division bench of this Court in **Principal Secretary to Govt. (Poll), General Admn.,Dept.,Hyderabad Vs. G. Rameshwar**[1] had held the amendment to be prospective and in as much as the respondent-applicant herein had retired, prior to

the date on which the amended Rule 11(b) in G.O.Ms. No. 145 dated 15.06.2004 had come into force, the said amendment would not enure to his benefit.

Sri P. Naveen Rao, learned Counsel for the respondent-applicant, on the other hand, would submit that irrespective of the respondent expressing his inclination to stay back at Nellore or to be posted nearby, it was always open for the petitioners herein either to have posted him in and around Nellore or to have instructed that he join duty at Chittoor and to have relieved him from his post at Nellore and since he could join at Chittoor only if he had been relieved from Nellore, whatever may have been his request, the respondent-applicant could not be said to have violated Rule 11(b). Learned counsel would submit that the government had taken note of the fact that failure to join duty, in the post to which employees appointed by promotion within fifteen days resulting in forfeiture, was causing hardship in as much as employees were not in a position to join in the promotion post within the allowed time for several reasons. In order to mitigate the hardship caused to such employees the government had decided to consider the cases, of such of those government employees who did not join duty in the promotion post, for promotion and accordingly Rule 11(b) was substituted as under:

"**(b) Time to join a post on appointment otherwise than by direct recruitment:-** A person appointed to a post, otherwise than by direct recruitment, shall be allowed joining time of 15(fifteen) days from the date of receipt of the order of appointment sent to the candidate by Registered Post with acknowledgement due or by any other means. If a person fails to join the post within the stipulated period of 15(fifteen) days or evades to join the post by proceeding on leave, the offer of appointment shall be treated as automatically cancelled and the name of the candidate shall be deemed to have been omitted from the list of the approved candidates and she/he shall forfeit his right of appointment both for the present and in future for the post."

The substituted Rule 11(b), of the A.P. State and Subordinate Services Rules, was notified in G.O.Ms. No. 145 dated 15.06.2004. Learned Counsel would submit that the substituted Rule 11(b) is a beneficial provision and would have retrospective effect, since it is declaratory in nature. Learned Counsel would rely on **Government of India Vs. Indian Tobacco Association**[2] in this regard. Learned Counsel would also rely on **M. Chandra Rao Vs. Registrar, A.P. Agricultural University, Hyderabad**[3] wherein this Court held that in the absence of a specific prohibition under the Rules, merely on the ground that an employee had expressed his disinclination to join in his promotion post, it did not debar the authorities from considering his case for promotion in the consequent vacancies that may arise subsequently.

While Sri P. Naveen Rao, Learned Counsel for the respondent-applicant, would seek to distinguish the Division bench judgment in **G. Rameshwar**[1], and contend that the question, as to whether a beneficial Rule, made in substitution of the previous Rule, would have retrospective effect, did not arise for consideration therein, the Learned Government Pleader for Services-I, on the other hand, would submit that the judgment of the Apex Court in **Indian Tobacco Association**[2] had no application to the present case in as much as it is settled law that, unless it is specifically provided to the contrary, a Rule is presumed to be prospective in its application and since the respondent-applicant was not even in service, when the amendment in G.O.Ms. No. 145 dated 15.06.2004 was issued, the question of applying the amended rule to his case did not arise.

Learned Govt. Pleader would seek to distinguish the judgment of this Court in **M. Chandra Rao**[3] and submit that Rule 5 of the A.P. Agricultural Municipal Services Regulation 1981 is not in para materia with Rule 11(b) of the A.P. State and Subordinate Service Rules whereunder it was specifically provided that, on failure to join duty in the promotional post, an employee would forego his future rights for promotion also.

As held in **L. Chandra Kumar Vs. Union of India**[4] the Administrative Tribunal is the Court of first instance. We do not propose to examine the above referred rival contentions, since none of these contentions have been examined by the Tribunal. The certiorari jurisdiction of this Court under Article 226 of the Constitution of India is supervisory and not appellate. If an error of law apparent on the face of the record is disclosed and a writ of certiorari is issued, the usual course to be adopted is to correct the error and send the case back to the Tribunal for its decision in accordance with law. It would be inappropriate for this Court, while exercising its certiorari jurisdiction, to consider the evidence for itself and reach its own conclusions in the matter which has been left by the legislature to the decisions of specially constituted Tribunals. (**T. Prem Sagar Vs. The Standard Vacuum Oil Company Madras**[5]).

While we agree with the submission of the learned Govt. Pleader that the finding of the Tribunal, that the respondent-applicant could not join his promotion post at Chittoor since he was not relieved from his post at Nellore, is perverse and requires to be quashed, the other contentions urged on either side are required to be considered by the Tribunal in the first instance

before they can be examined by this Court in proceedings under Article 226 of the Constitution of India.

The order of the Tribunal, in O.A. 10699 of 2002 dated 07.01.2004, is quashed and the O.A. remanded to the Tribunal for its consideration afresh, on merits, in accordance with law. The writ petition is disposed of accordingly. However, in the circumstances, without costs.

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B.PRAKASH RAO, J

Date: -08-2006

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RAMESH RANGANATHAN, J

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[1] 2005(6) ALD 810(DB)

[2] (2005)7 SCC 396

[3] 1996(4) ALD 1234

[4] AIR 1997 SC 1125

[5] 1964(5) SCR 1030